IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 685

LESLIE L. CONNER, *Petitioner*,

v.

A. J. SIMLER, *Respondent*.

PETITION FOR REHEARING

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Petitioner prays that this Court grant rehearing of its order of March 20, 1961, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case as prayed for in the petition filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

This Court denied certiorari in this case on March 20, 1961. Subsequently on March 28, 1961 the Supreme Court of Oklahoma decided *Southard* v. *MacDonald*,

. . . . Okla. . . . . , 32 Okla. Bar. Assoc. Jour. 609,[1] which is directly in conflict with the decision of the Tenth Circuit in this case.

The Supreme Court of Oklahoma in *Southard* v. *MacDonald*, held that "*Where it is necessary to cancel a contingent fee contract before any other relief prayed for can be granted, and the cancellation of such contract is the basic relief sought, neither party is entitled to a jury trial for the reason that the cancellation is a purely equitable matter.*"[2] It should be noted here that the Oklahoma court was applying an established principle of Oklahoma law to a situation it had not before considered, i.e., contingent fee contracts. This is evident from its discussion of several earlier Oklahoma decisions on which it based its holding. *Id.* at 611.

In reversing the summary judgment in this case in favor of petitioner, the Tenth Circuit clearly erred and its decision conflicts with the Oklahoma Supreme Court. This is evident from the language the Court of Appeals used:

> "We do not intend to minimize these services or to say that the contingent fees provided for in the September 25th letter are unreasonable, *but we are convinced that under well established principles of law in Oklahoma, the case should have been submitted to a jury* on the question of whether

[1] Ten copies of the issue containing the opinion are being filed with this petition.

[2] The quotation is the law of Oklahoma, as set forth in the syllabus of the case. Under 12 O.S.A. § 977, the Justice writing the opinion must set forth the points of law in a decided case in a syllabus. These are the law of the case and the opinion itself merely aids in the correct interpretation of the syllabi. *Corbin* v. *Wilkinson*, 175 Okla. 247, 52 P. 2d 45 (1936); *1942 Chevrolet* v. *State ex. rel. Cline*, 192 Okla. 555, 136 P. 2d 395 (1943).

> the September 25th contract was fair, just and equitable and free from fraud." (Emphasis added.) *Simler* v. *Conner*, 282 F. 2d 382, 386.

A comparison of the two cases establishes a direct conflict between a Court of Appeals and the highest court of a state. For this reason a writ of certiorari should be granted. *Huddleston* v. *Dwyer*, 322 U.S. 232; *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464. In the *Huddleston* case, this Court held that a Court of Appeals decision based on state law correctly applied at that time, *must* be reversed on review if in the meantime the state court announces a different rule of law. It is clear that under this principle this case must be reversed, or remanded to the Court of Appeals for reconsideration. *Huddleston* v. *Dwyer, supra.*

The facts of both this case and of *Southard* v. *MacDonald* are strikingly similar. In *Southard* two of six children engaged MacDonald, an attorney, to "break" the joint will of their deceased father and surviving mother. They feared that their mother would dispose of certain land instead of preserving it for them. MacDonald was to receive 40 percent of the two shares if successful, and a written contingent fee contract and a warranty deed to MacDonald were executed by the two children. MacDonald was successful in preventing the mother from disposing of the land. After her death, three of the children brought an action to partition the land and named MacDonald and the other three children as defendants. The two who hired MacDonald answered and also filed a cross-petition against MacDonald alleging that the contingent fee contract was "a nullity because procured by fraud and deceit, not properly acknowledged, not delivered," and that there was a "complete failure of consideration."

They sought to have the contingent fee contract and the deed set aside. The trial court denied a motion for a jury trial and gave judgment for MacDonald.

In the present case, respondent hired petitioner to "break" his sister's will that left him but $1.00. He first signed a contract for a "reasonable fee" and two months later, agreed in writing (September 25th letter—see Petition, p. 6) to pay petitioner "50%" of the amount recovered if the case is appealed to the Supreme Court." This agreement was merely explanatory of the original contingent "reasonable fee" provided in the July 18th contract. (Pet. p. 4) The September 25th letter opened:

> "With reference to my letter of July 18, 1952 employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:"

After five years of labor and nineteen different proceedings petitioner succeeded in obtaining a valuable oil tract for respondent. In addition, in a separate suit, he prevented the tract from bearing the administration expenses ($73,000.00). After the litigation was won, the respondent refused to honor his contract. He sued for a declaratory judgment to declare the contingent fee contract void, alleging it was procured by fraud, that there was no consideration, that it was a nullity, the very same things alleged about the *Southard* v. *MacDonald* contract. The trial court upheld the contract and ordered half of the land to be conveyed to petitioner.

To this point the two almost identical cases involving identical issues were resolved under identical law, although one was in a federal court and the other in a state court of Oklahoma.

It has been pointed out above that the Tenth Circuit in this case reversed the District Court because it believed, and so stated in its opinion (282 F. 2d at 386), that Oklahoma's law required a jury to decide whether the contract was "entered into fairly." If a jury found it was, "then it may be enforced." This is precisely the contention overruled by the Oklahoma Supreme Court in *Southard* v. *MacDonald*. It held:

> "Since it is clear that the prime and necessary purpose of plaintiff's action was based upon the cancellation of the contingent fee contract and deed, alleged to have been secured by fraud and deceit, *a purely equitable action, we find no merit in the contention that it was error to deny plaintiffs a jury trial.*" (Emphasis added)

The Tenth Circuit relied expressly on "well established principles of law in Oklahoma." Its reliance was erroneous and its decision must therefore fall. It is the Oklahoma law that there is no right to have a jury to decide the validity of a contingent fee contract. There being no issue of fact, the summary judgment of the United States District Court upholding the contract in this case must be reinstated. 28 U.S.C. Rule 56, F.R. Civ. P.

One of the cases relied upon by the Tenth Circuit in its decision was *Haunstein* v. *McCalister*, 172 Okla. 613, 46 P. 2d 552. It was cited as authority that "the burden is upon the attorney" to show that contracts made with clients after the relationship has begun are fairly made, without fraud, duress, or imposition. In *Southard* v. *MacDonald*, at p. 613, the Supreme Court of Oklahoma also commented on that case, but gave it a totally different emphasis:

> "In *Haunstein* v. *McCalister*, 172 Okla. 613, 46 P. 2d 552, *we approved a judgment wherein a fee was increased after the original contract of employment.* The evidence in the case at bar does not show overreaching on the part of the defendant." (Emphasis added.)

Thus, that case means that a fee may be increased after the original agreement; it will be upheld if there was no overreaching by the attorney; and the court, not the jury, decides the question of whether there was overreaching. A fortiori, in this case, in which the fee was not increased but merely defined, the trial court can, *and did*, find the agreement to be without fraud.

In this case, as in *Southard*, there could be no payment to the attorney except what was specified in the written contract unless that contract was cancelled by the court. That was the heart of the *Southard* suit. "Unless and until this contract was cancelled the court could not reach" any other issue. 32 O.B.A.J. at 611. Cancellation of the contract was "the prime and necessary purpose" of the suit. This fixed the nature of the suit as equitable and determined that neither party was entitled to a jury trial. Exactly the same facts exist in and control this case. Simler, the respondent, sued to have the court adjudge him to pay a "reasonable fee." Before the Court could do so it would have to cancel the existing contingent fee contract. It was "necessary to cancel a contingent fee contract before any other re-

lief" could be granted. In Oklahoma the law in this situation is now unmistakeable. "(N)either party is entitled to a jury trial for the reason that the cancellation is a purely equitable matter." *Southard* v. *MacDonald*, 32 O.B.A.J. at 699. A clear conflict has arisen between the Court of Appeals for the Tenth Circuit and the highest court of Oklahoma.

In *Phillips Petroleum Co.* v. *Cabot Carbon Co.*, 348 U.S. 867, this Court vacated a Tenth Circuit judgment which conflicted with a subsequent ruling of the Corporation Commission of Oklahoma and remanded the case to the Court of Appeals for reconsideration in the light of the Commission ruling. The same principle is applicable here. The Court of Appeals has declared that its decision rests solely on Oklahoma law. It is now evident that its concept of the Oklahoma law was erroneous. Its decision must be vacated and the original judgment reinstated, or the Court of Appeals must reconsider its decision in the light of *Southard* v. *MacDonald*.

CONCLUSION

This case is clearly within the language and intent of Rule 58 of this Court. It is respectfully submitted that a rehearing should be granted, that a Writ of Certiorari should issue, and that the decision of the Court of Appeals should be reversed, or the case remanded to the Court of Appeals for reconsideration in the light

of the decision of the Supreme Court of Oklahoma in *Southard* v. *MacDonald*.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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